

MARIO V. VENTURA,)	No. C 05-1814 JF (PR)
)	
Plaintiff,)	ORDER OF SERVICE; DIRECTING
)	DEFENDANTS TO FILE
vs.)	DISPOSITIVE MOTION OR
)	NOTICE REGARDING SUCH
)	MOTION
KEVIN POUGH, et al.,)	
)	
Defendants.)	
)	

28

CONCLUSION

For the reasons stated above, the Court orders as follows:

1. The Clerk of the Court shall issue summons and the United States Marshal shall serve, without prepayment of fees, a copy of the May 2, 2005, complaint in this matter, all attachments thereto, and a copy of this order upon **Officer Kevin Pough, Officer Joseph Hinkston, and the Chief of Police of the City of Menlo Park Police Department, and the City of Menlo Park.** The Clerk shall also mail courtesy copies of the complaint and this order to the City Attorney's Office of the City of Menlo Park.

2. No later than **ninety (90) days** from the date of this order, Defendants shall file a motion for summary judgment or other dispositive motion with respect to the claim in the complaint found to be cognizable above.

a. If Defendants elect to file a motion to dismiss on the grounds that Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v. Terhune, 540 U.S. 810 (2003).

b. Any motion for summary judgment shall be supported by adequate factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil Procedure. **Defendants are advised that summary judgment cannot be granted, nor qualified immunity found, if material facts are in dispute. If any Defendant is of the opinion that this case cannot be resolved by summary judgment, he shall so inform the Court prior to the date the summary judgment motion is due.**

3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on Defendants no later than **thirty (30) days** from the date Defendants' motion is filed.

a. In the event Defendants file an unenumerated motion to dismiss

1 under Rule 12(b), Plaintiff is hereby cautioned as follows:¹

2 The Defendants have made a motion to dismiss pursuant to Rule
3 12(b) of the Federal Rules of Civil Procedure, on the ground you have not
4 exhausted your administrative remedies. The motion will, if granted, result
5 in the dismissal of your case. When a party you are suing makes a motion
6 to dismiss for failure to exhaust, and that motion is properly supported by
7 declarations (or other sworn testimony) and/or documents, you may not
8 simply rely on what your complaint says. Instead, you must set out specific
9 facts in declarations, depositions, answers to interrogatories, or documents,
10 that contradict the facts shown in the Defendant's declarations and
11 documents and show that you have in fact exhausted your claims. If you do
12 not submit your own evidence in opposition, the motion to dismiss, if
13 appropriate, may be granted and the case dismissed.

14 b. In the event Defendants file a motion for summary judgment, the
15 Ninth Circuit has held that the following notice should be given to Plaintiffs:

16 The defendants have made a motion for summary judgment by
17 which they seek to have your case dismissed. A motion for summary
18 judgment under Rule 56 of the Federal Rules of Civil Procedure will, if
19 granted, end your case.

20 Rule 56 tells you what you must do in order to oppose a motion for
21 summary judgment. Generally, summary judgment must be granted when
22 there is no genuine issue of material fact--that is, if there is no real dispute
23 about any fact that would affect the result of your case, the party who asked
24 for summary judgment is entitled to judgment as a matter of law, which will
25 end your case. When a party you are suing makes a motion for summary
26 judgment that is properly supported by declarations (or other sworn
27 testimony), you cannot simply rely on what your complaint says. Instead,
28 you must set out specific facts in declarations, depositions, answers to
interrogatories, or authenticated documents, as provided in Rule 56(e), that
contradict the facts shown in the defendants' declarations and documents
and show that there is a genuine issue of material fact for trial. If you do
not submit your own evidence in opposition, summary judgment, if
appropriate, may be entered against you. If summary judgment is granted
in favor of defendants, your case will be dismissed and there will be no
trial.

21 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
22 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477
23 U.S. 317 (1986) (holding party opposing summary judgment must come forward with
24 evidence showing triable issues of material fact on every essential element of his claim).
25 Plaintiff is cautioned that failure to file an opposition to Defendants' motion for summary
26

27 ¹The following notice is adapted from the summary judgment notice to be given to pro se
28 prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See
Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and
2 granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52,
3 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

4 4. Defendants shall file a reply brief no later than **fifteen (15) days** after
5 Plaintiff's opposition is filed.

6 5. The motion shall be deemed submitted as of the date the reply brief is due.
7 No hearing will be held on the motion unless the Court so orders at a later date.

8 6. All communications by the Plaintiff with the Court must be served on
9 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
10 copy of the document to Defendants or Defendants' counsel.

11 7. Discovery may be taken in accordance with the Federal Rules of Civil
12 Procedure. No further Court order is required before the parties may conduct discovery.

13 8. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
14 Court informed of any change of address and must comply with the Court's orders in a
15 timely fashion. Failure to do so may result in the dismissal of this action for failure to
16 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

17 IT IS SO ORDERED.

18 DATED: 4/25/08


JEREMY FOGEL
United States District Judge